

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THYME HOLDINGS, LLC, D/B/A WESTGATE
GARDENS CARE CENTER
Employer

and

Case 32-RC-183272

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 2015
Petitioner

ORDER

The Employer's Request for Review of the Acting Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review.¹

MARK GASTON PEARCE,

MEMBER

LAUREN McFERRAN,

MEMBER

¹ Our dissenting colleague reiterates a position rejected by the Board in *Buchanan Marine, L.P.*, 363 NLRB No. 58, slip op. at 2 (2015), which we decline to revisit. See also *LakeWood Health Center d/b/a Chi LakeWood Health*, 365 NLRB No. 10, slip op. at 1 fn. 1 (2016).

Acting Chairman Miscimarra, dissenting in part:

My colleagues deny the Employer's Request for Review and affirm the Regional Director's determination that the Employer's Licensed Vocational Nurses (LVNs) are not statutory supervisors. I disagree with the majority's finding and believe that substantial questions exist regarding whether the LVNs possess authority to assign other employees, which constitutes supervisory authority under Section 2(11) of the Act.¹ Accordingly, I would grant review in relevant part.

The Regional Director found that the LVNs are not statutory supervisors under Section 2(11). The 37 individuals whose supervisory status is disputed oversee work performed by approximately 80 Certified Nursing Assistants (CNAs). If the disputed individuals are deemed non-supervisors, the Employer would have a total of approximately 129 employees² over whom supervisory authority is exercised by only five on-site individuals: an Administrator, a Director of Nursing, two Assistant Directors of Nursing, and a Director of Staff Development.³ Given the nature of the Employer's operations, I believe a substantial question exists as to whether it is plausible to conclude that all supervisory authority over 129 statutory employees could be vested exclusively in these five individuals. See *Buchanan Marine*, 363 NLRB No. 58, slip op. at 9-10 (2015) (Member Miscimarra, dissenting), where I stated that when applying the supervisory criteria set forth in Section 2(11), the Board should consider (i) the nature of employer's operations; (ii) the work performed by undisputed statutory employees; and (iii) whether it is plausible to conclude that all supervisory authority is vested in persons other than those whose supervisory status is in dispute. These factors are especially relevant in the instant case, considering that during nights and weekends—almost 65% of the facility's operating time—the five aforementioned supervisors are not present, and the LVNs are the highest-ranking individuals who would have the authority to assign work to CNAs regarding patient care. See *Lakewood Health Center*, 365 NLRB No. 10, slip op. at 3-4 (2016) (Member Miscimarra, dissenting).

For the reasons stated above, I believe the Request for Review raises substantial questions about whether the LVNs possess the authority to assign employees under Section 2(11) of the Act. Accordingly, I respectfully dissent in part from my colleagues' denial of the Request for Review.⁴

¹ The Employer does not contend that the LVNs possess the supervisory authority to responsibly direct the CNAs in the performance of their work.

² This figure includes 37 petitioned-for LVNs, 12 Registered Nurses (RNs) and approximately 80 Certified Nursing Assistants (CNAs). The RNs, like the LVNs, are classified as charge nurses by the Employer, and the Regional Director did not find that they played any role in the assignment of work to CNAs.

³ The Employer also has an NOC Shift Supervisor position, which was vacant at the time the petition was filed.

⁴ I concur in denying review of the Regional Director's findings that the LVNs do not possess authority to hire, reward, or discipline employees, since the Employer's Request for Review does not dispute the findings of the Regional Director that establish that the LVNs do not possess these indicia of supervisory status. I do not, however, agree with the Regional Director's analysis insofar as she discounted or disregarded uncontroverted evidence of supervisory authority simply because it was not corroborated by other evidence. See *Buchanan Marine*, supra, slip op. at 9 (Member Miscimarra, dissenting) (noting that the Board should not disregard un rebutted evidence "merely because it could have been stronger, more detailed, or supported by more specific examples").

PHILIP A. MISCIMARRA, ACTING CHAIRMAN

Dated, Washington, DC., March 31, 2017.